

1-1-1999

Carcieri's Self-Described Progressive Critique of the ACLU on Proposition 209: A Conservative Response

David Benjamin Oppenheimer

Follow this and additional works at: <http://digitalcommons.law.scu.edu/lawreview>



Part of the [Law Commons](#)

Recommended Citation

David Benjamin Oppenheimer, *Carcieri's Self-Described Progressive Critique of the ACLU on Proposition 209: A Conservative Response*, 39 SANTA CLARA L. REV. 1153 (1999).

Available at: <http://digitalcommons.law.scu.edu/lawreview/vol39/iss4/7>

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

ARTICLE

CARCIERI'S SELF-DESCRIBED "PROGRESSIVE" CRITIQUE OF THE ACLU ON PROPOSITION 209: A "CONSERVATIVE" RESPONSE

David Benjamin Oppenheimer*

© David Benjamin Oppenheimer, 1999

I. INTRODUCTION

In the first issue of this volume of the *Santa Clara Law Review*, Martin D. Carcieri criticizes the ACLU for its advocacy opposing California's Proposition 209.¹ The editors have kindly permitted me to respond. I will argue herein that Professor Carcieri's critique is unpersuasive. It relies on a distortion of the ACLU position, a misunderstanding of Supreme Court practice and of equal protection law, a

* Professor of Law, Golden Gate University; J.D., Harvard Law School, 1978; B.A., University Without Walls, 1972. I should disclose at the outset that I am not acting on behalf of the ACLU; I alone am responsible for this response (although I am extremely grateful to my research assistants, Rachel Brasso Razon and Catharine Langer, and to my *Santa Clara Law Review* editor, Keith Valory, for their invaluable assistance). I do, however, have a close connection to the ACLU, and to its position on Proposition 209. I serve on the board of directors of the ACLU of Northern California, and on its legal committee. In this capacity, I reviewed and supported the recommendation that the ACLU litigate the legitimacy of Proposition 209. When Judge Henderson's decision holding the initiative unconstitutional was appealed to the United States Court of Appeals, I co-authored an amicus curie brief in support of his decision on behalf of the American Jewish Congress and the National Council of Churches. And, during the initiative campaign, I frequently debated its merits at public events at the request of the ACLU. Because I approach this task as a partisan, not a neutral, I recognize it is particularly important that my assertions are well supported.

1. Martin D. Carcieri, *A Progressive Reply to the ACLU on Proposition 209*, 39 SANTA CLARA L. REV. 141 (1998).

reliance on fiction as fact, the substitution of anecdote for evidence, and a collection of unsupported and unsupportable assertions about American society today.

First, Professor Carcieri argues that the ACLU was wrong in claiming that Proposition 209 violates the right to equal protection provided by the Fourteenth Amendment to the United States Constitution. He asserts that his position has been vindicated by the United States Supreme Court, which voted to deny review of the decision by the United States Court of Appeals rejecting the ACLU's facial challenge of the initiative.² In Part II of this response, I will argue that the Court's denial of review is not a decision on the merits of the case and in no way vindicates any parties' position. This is particularly true because the petition sought review of the rejection of a facial challenge to the initiative's constitutionality. Once Proposition 209 is applied to particular programs and practices, the Supreme Court may yet rule that, as applied, it is unconstitutional.

Second, Professor Carcieri argues that the ACLU critique of the initiative is defective because it ignores the will of a majority of California voters³ and elevates "group rights" over "individual rights."⁴ In Part III of this response I will argue that Carcieri has distorted the ACLU position to create a "straw man." The ACLU lawsuit claimed that Proposition 209, by singling out women and minorities and making it harder for them, as compared to veterans, disabled persons, and the elderly, to seek affirmative action type programs, denied them equal protection of the laws. Professor Carcieri asserts that the ACLU's arguments "offend democracy."⁵ But when majorities deprive minorities of rights guaranteed by the United States Constitution, a constitutional challenge is not offensive to our constitutional democracy. Nor does the ACLU argue, as Carcieri claims, that groups have constitutional rights; rather, individuals have constitutional rights when they are denied equal opportunity based on their group membership. At the heart of the ACLU lawsuit was the contention that individual women and/or minority group members were being deprived of their constitutional rights.

2. *Id.* at 142-43, 147, 181.

3. *Id.* at 145-47, 181.

4. *Id.* at 147-62.

5. *Id.* at 145 n.23.

Third, Professor Carcieri argues that the ACLU critique of the initiative is "puzzling"⁶ because the initiative does not disproportionately disadvantage women and minority group members⁷ and is thus not subject to an equal protection challenge.⁸ In Part IV of this response I will demonstrate why, under well established constitutional doctrine, the initiative had precisely the kind of effect on minority group members that has caused the Supreme Court to reject similar initiatives in the past.⁹

Fourth, Professor Carcieri turns to personal anecdote, a method of argument he had earlier criticized,¹⁰ to argue that he has personally helped many women and minority group members by writing letters of reference for them, despite the fact that he is a white man.¹¹ He offers this anecdote as proof that white men are not necessarily racists and do not necessarily grant preferences to other white men. The supporters of affirmative action, he argues, actually encourage white men to discriminate against women and minorities, not because white men are racists or sexists, but because white men are given no choice but to defend their racial and gender self-interests. He then complains that it is unfair that he is not given fair consideration for public university teaching positions, relying, as his evidence of such discrimination, on a work of fiction.¹² In Part V of this response I argue that Professor Carcieri's anecdotes and fictional accounts prove nothing. Despite his unsupported claims, the available evidence, which he completely disregards, conclusively demonstrates that white men are not disadvantaged in the search for university teaching jobs, or in

6. *Id.* at 164.

7. Carcieri, *supra* note 1, at 164-67.

8. *Id.* at 167-72.

9. *Id.* at 172. Remarkably, Professor Carcieri concedes the possibility that the ACLU's arguments on this critical point were meritorious and that Judge Thelton Henderson's district court decision was correct. But he complains that if so, they were only correct because of their reliance on a sixteen-year-old decision by the Supreme Court, which, although never overruled, might be decided differently today.

10. *Id.* at 160 n.76. "Unlike a legal argument in an adversary proceeding, a narrative is not subject to challenge or cross-examination, as is essential when enforceable rights are at stake. A narrator can by ignorance or design omit parts of a story that would be relevant or even crucial in a legal setting." *Id.*

11. *Id.* at 179-81.

12. See *infra* notes 81-84 and accompanying text.

other areas of American society. In most fields of employment, they continue to enjoy substantial advantages. In a few areas, affirmative action has leveled the field on which men and women, white and non-white, compete for employment opportunities. Carcieri's unsupported insistence that he, as a white man, is disadvantaged, suggests that he has substituted anecdote for evidence as a result of personal bitterness. His own experience has, perhaps, clouded his judgment and his scholarship.

Finally, Professor Carcieri concludes that some forms of affirmative action programs, including consideration of race in college admissions,¹³ remedial affirmative action,¹⁴ and aggressive race and gender directed outreach and recruitment programs,¹⁵ should be permitted to continue. In Part VI of this response I will discuss the irony of Professor Carcieri's conclusion. The very programs he would save are those most at risk under the initiative. The kinds of programs he condemns were, even before Proposition 209 passed, nearly impossible to find, because they are so rarely permissible under the already well established United States Supreme Court standards Carcieri extols in his article.¹⁶

In Part VII of this response, I conclude that Professor Carcieri's critique of the ACLU's position on Proposition 209 was ill considered, that his arguments were not well supported, and that his conclusions should be rejected.

II. THE SUPREME COURT'S DENIAL OF CERTIORARI IN THE PROPOSITION 209 CASE WAS NOT A DECISION ON THE MERITS

On November 5, 1996, the California electorate passed into law Proposition 209, amending the State Constitution to provide that the state may not "grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."¹⁷ The purpose of the initiative was to eliminate governmental affirmative action.¹⁸

13. Carcieri, *supra* note 1, at 159, 171.

14. *Id.* at 173-75.

15. *Id.* at 181-83.

16. *Id.* at 172-77.

17. CAL. CONST. art. I, § 31.

18. *See Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1493 (N.D.

The day after the election, the ACLU¹⁹ and several other civil rights organizations,²⁰ as counsel, filed a federal lawsuit on behalf of thirteen civil rights and business groups²¹ and eleven individuals, challenging the constitutionality of the initiative. They argued that on its face the new law violated the Equal Protection clause of the Fourteenth Amendment to the United States Constitution, by depriving women and minority group members of an equal right to participate in the political life of California communities.²²

On December 23, 1996, United States District Court Chief Judge Thelton E. Henderson issued a preliminary injunction enjoining the state from implementing the initiative.²³ The court held that the plaintiffs had demonstrated a likelihood of success on their claim that the proposition violated the Fourteenth Amendment. The State appealed. On April 8, 1997, a three judge panel of the United States Circuit Court for the Ninth Circuit, in a decision by Circuit Judge Diarmuid F. O'Scannlain, vacated the preliminary injunction, rejecting the ACLU challenge.²⁴ The Ninth Circuit subsequently denied a petition for rehearing and denied a petition for rehearing en banc.²⁵ Thereafter, the United States Supreme Court denied a stay, and then denied

Cal. 1996).

19. Three ACLU affiliates (Northern California, Southern California, and San Diego) and the ACLU national legal office were listed among the plaintiffs' counsel. *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1487 (N.D. Cal. 1996), *vacated*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997). Professor Carcieri refers to this as the ACLU suit, as shall I, but we both recognize that there were numerous counsel and plaintiffs. *See Carcieri, supra* note 1, at 142 n.5.

20. Other counsel included the Lawyers' Committee for Civil Rights and Equal Rights Advocates (both of whose boards of directors I serve on), as well as the Employment Law Center, the Impact Fund, the Asian Pacific American Legal Center, the California Women's Law Center, the NOW Legal Defense and Education Fund, and People for the American way. *Id.*

21. The plaintiffs included the Coalition for Economic Equity (a group of women and minority small business owners), the California NAACP, the California AFL-CIO, and several other civil rights and women's and minority business organizations. *Id.*

22. *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1499-1510 (N.D. Cal. 1996), *vacated*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997).

23. *Id.*

24. *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997).

25. *Id.*

a petition for a writ of certiorari, thus denying review of the decision below.²⁶ On remand to the district court, Judge Henderson entered judgment on the pleadings on behalf of the defendants, thus rejecting the claim that on its face the initiative was unconstitutional.²⁷

Professor Carcieri begins his critique of the ACLU's position in the Proposition 209 controversy by claiming that the Supreme Court's denial of certiorari was a vindication of his position, and conversely, a repudiation of the ACLU's and Judge Henderson's. He characterizes the Supreme Court's denial of the petition as a "refusal to intervene"²⁸ and describes this refusal as having "given states and localities a green light."²⁹ He further interprets the Supreme Court's decision as "the Court's refusal to disturb the Ninth Circuit's ruling."³⁰ Finally, he notes that the Court has rejected certiorari in other affirmative action cases, as further evidence of the Court's views.³¹ By these arguments, Professor Carcieri suggests that the Court's denial of certiorari may be taken as evidence of the Court's views of the merits of the case.

Professor Carcieri commits a serious error in his legal analysis of the Court's denial of certiorari. First, it is well established that a denial of certiorari is not a decision on the merits³² and that "one cannot deduce any decision on the merits or other precedential value from such denials."³³ As Justice Stevens has explained, "[s]ometimes such an order reflects nothing more than a conclusion that a particular case may not constitute an appropriate forum in which to decide a significant issue."³⁴ The Court may be waiting to see what happens in the State courts, or in other United States Circuit Courts, or may be waiting for a case that it believes is

26. *Coalition for Econ. Equity v. Wilson*, 118 S. Ct. 397 (1997) (denying stay and denying certiorari).

27. *Coalition for Econ. Equity v. Wilson*, 1998 WL 61215 (N.D. Cal.).

28. Carcieri, *supra* note 1, at 142.

29. *Id.* at 142-43.

30. *Id.* at 143; *see also id.* at 171 ("[T]he Supreme Court properly declined to use the political structure doctrine to reverse the Ninth Circuit.").

31. *Id.* at 142 n.10.

32. *See, e.g., Equality Found. Inc., v. City of Cincinnati*, 119 S. Ct. 365, (1998).

33. RONALD D. ROTUNDA AND JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 2.5 (2d ed. 1992).

34. *Equality Found. Inc., v. City of Cincinnati*, 119 S. Ct. 365, 365 (1998).

narrower, or better briefed.

Moreover, in the Proposition 209 case, there was a particularly compelling reason for the Court to deny certiorari. The ACLU challenge to the constitutionality of Proposition 209 was a "facial challenge"—a claim that on its face the initiative violated the United States Constitution.³⁵ Such cases are particularly good candidates for the denial of review for two reasons. First, they are the most difficult challenges to mount. Second, they are likely to return to the Court with better developed facts, since a ruling denying a facial challenge to a law's constitutionality does not determine its constitutionality as applied to a particular set of facts.

Although there is some disagreement over the proper test for facial invalidity, the Court has uniformly held that facial challenges are "generally disfavored."³⁶ Chief Justice Rehnquist believes that "a facial challenge to a legislative [a]ct is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [a]ct would be valid."³⁷ Justice Stevens prefers a less stringent rule.³⁸ He would permit such a challenge when the statute may be invalid "in all or most cases in which it might be applied."³⁹ Justice O'Connor describes facial challenges as, "'manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.'"⁴⁰ By any standard, the effect of the denial of certiorari in the Proposition 209 case was merely to put off for another day, in a better developed factual setting, the legitimacy of the initiative as applied to a particular affirmative action program or practice. Only when the courts, and perhaps ultimately the Supreme Court, have judged its constitutional validity as applied, can we determine whether the initiative violates the Constitution.

35. See *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1489 (N.D. Cal. 1997) (granting preliminary injunction), 1998 WL 61215 (N.D. Cal. Feb. 3, 1998) (entering judgment on the pleadings).

36. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223 (1990).

37. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

38. See *Washington v. Glucksberg*, 521 U.S. 702, 739-40 (1997) (Stevens, J., concurring).

39. *Id.* at 739 (emphasis added).

40. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 579 (1998) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)).

III. THE ACLU DID NOT "OFFEND DEMOCRACY" BY ARGUING THAT PROPOSITION 209 WAS UNCONSTITUTIONAL AND DID NOT ARGUE THAT "GROUP RIGHTS" SHOULD BE ELEVATED OVER "INDIVIDUAL RIGHTS"

The passage of Proposition 209 raised a problem that the federal courts have confronted many times since the passage of the post-Civil War amendments to the Constitution. Simply stated, when a white majority⁴¹ uses the law, through legislation, state constitutional amendment, or referendum/initiative, to repress the rights of minorities, may the courts properly intervene to reverse the will of the voters? Because our courts must respect democratic values, including the value of majority rule, courts must be reluctant to overturn a properly enacted law. But the principle of judicial review established in *Marbury v. Madison*⁴² and the essential right of minority group members to equal protection of the law clearly establish that in enforcing the Constitution a court must sometimes determine that a legislative act or a voters' initiative is illegitimate. It is this principle that establishes our nation's status as a "constitutional democracy" or "constitutional republic."

Professor Carcieri asserts that the ACLU made "unqualified claims about the dangers of majority rule"⁴³ in arguing that without the safeguards of the Constitution, "the American system would allow a majority to vote to permit slavery."⁴⁴ Further, he stated that these arguments "offended democracy."⁴⁵ While recognizing that the Constitution does

41. Proposition 209 passed with the support of 63% of white voters, 39% of Asian voters, 26% of black voters, and 24% of Latino voters. See *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1495 (N.D. Cal. 1996).

42. 5 U.S. 137 (1803).

43. Carcieri, *supra* note 1, at 146-47.

44. *Id.* at 144. It is, of course, undeniably true that absent the Thirteenth Amendment, a majority could reinstate slavery. Professor Carcieri objects to the ACLU assertion of this fact as a "distort[ion of] the scope of what is likely or even possible within our system" because of the passage of the Thirteenth Amendment. *Id.* at 146 n.29. But this, of course, misses the point. The Constitution, as amended, prevents the majority from doing that which would otherwise be permissible.

45. *Id.* at 144 n.23.

act as a brake on majority rule,⁴⁶ Professor Carcieri argues that Proposition 209 is entitled to a "presumption" of constitutionality because it was passed by a majority of California voters.⁴⁷

Perhaps the best response to this critique is to quote from Judge Henderson's opinion. One cannot help but conclude that Judge Henderson anticipated arguments such as Professor Carcieri's, when he wrote:

It is not for this or any other court to lightly upset the expectations of the voters. At the same time, our system of democracy teaches that the will of the people, important as it is, does not reign absolute but must be kept in harmony with our Constitution.

Thus, the issue is not whether one judge can thwart the will of the people; rather, the issue is whether the challenged enactment complies with our Constitution and Bill of Rights. Without a doubt, federal courts have no duty more important than to protect the rights and liberties of all Americans by considering and ruling on such issues, no matter how contentious or controversial they may be. This duty is certainly undiminished where the law under consideration comes directly from the ballot box and without the benefit of the legislative process. As the Supreme Court aptly noted in another socially charged case: "Nor does the implementation of . . . change through popular referendum immunize it [from constitutional scrutiny]. The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed."⁴⁸

Professor Carcieri further complains that the ACLU's arguments elevate "group rights" over individual rights.⁴⁹ Professor Carcieri both misstates the ACLU position and ignores basic principles of Constitutional law. First, the Supreme Court recognizes that individuals are often mistreated because of their group identity; when the

46. *Id.* at 144-45.

47. *Id.* at 147-48. The problem with this presumption is that virtually all affirmative action programs were also passed by a majority, albeit a majority of legislators or other elected officials, and are thus entitled to the same presumption.

48. See *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1490 (N.D. Cal. 1996) (quoting *Hunter v. Erickson*, 393 U.S. 385, 392 (1969)).

49. Carcieri, *supra* note 1, at 147-62.

government places higher burdens on racial groups, as groups, it violates the constitutional rights of the groups' individual members to equal protection. As the Court explained in *Hunter v. Erickson*,⁵⁰ a referendum violates equal protection when it "places unusual burdens on the ability of racial groups to enact legislation specially designed to overcome the 'special condition' of prejudice."⁵¹

Moreover, the plaintiffs in the ACLU lawsuit, while acting as class representatives, were themselves individuals (or in some cases organizations made up of individuals) whose individual right to equal protection were at stake. They were individual women and minority group members who, because of their group status, would lose government benefits to which they were entitled. Veterans were not threatened with the loss of veterans' benefits. Elderly persons were not threatened with the loss of programs for the elderly. But women and minority group members were threatened with the loss of affirmative action programs that were available to them because they were members of one or more groups which were entitled to such benefits. Without being permitted to analyze discrimination cases as class-based "group" discrimination cases, the Fourteenth Amendment, and most civil rights statutes, would be eviscerated.

IV. THE ACLU PRESENTED A LEGITIMATE, ALTHOUGH UNSUCCESSFUL, ARGUMENT THAT PROPOSITION 209 VIOLATES THE CONSTITUTION BECAUSE IT DISTORTS GOVERNMENTAL PROCESSES IN SUCH A WAY AS TO PLACE SPECIAL BURDENS ON THE ABILITY OF MINORITY GROUPS TO ACHIEVE BENEFICIAL LEGISLATION

Turning to the substance of the ACLU's argument, Professor Carcieri complains that the ACLU and Judge Henderson improperly applied a doctrine of the constitutional law of equal protection known as the "*Hunter/Seattle* doctrine."⁵² He claims to be "puzzled"⁵³ at how the ACLU

50. 393 U.S. 386 (1969).

51. *Id.* at 486 (quoting *United States v. Caroline Products*, 304 U.S. 144, 153 n.4 (1938)).

52. See *Hunter v. Erickson*, 393 U.S. 385 (1969) and *Washington v. Seattle Sch. Dist.*, 458 U.S. 457 (1982); see also Vikram D. Amar and Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 HASTINGS CONST. L.Q. 1019 (1996).

could have made such an argument, and how Judge Henderson could have accepted it. Moreover, he asserts, even if the doctrine was properly argued and applied, it requires reliance on an "old" and close decision, and should be discarded.⁵⁴ I will argue herein that any "puzzlement" Professor Carcieri claims is disingenuous. The doctrine has clear application to the Proposition 209 case. Moreover, there is no authority for the proposition that judges and lawyers should ignore close cases or "old" cases, particularly where "old" means a 1982 decision.⁵⁵

A. *The Hunter/Seattle Doctrine*

In the wake of the Civil War, this nation amended our Constitution to provide that no state may deprive "any person within its jurisdiction the equal protection of the laws"⁵⁶ and that the "right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."⁵⁷ Since early in this century, the United States Supreme Court has recognized that states may deprive Americans of their civil rights by indirection as well as explicit classification, by creating classifications that, in their effect, exclude participation in democratic decision making.⁵⁸ States may accomplish this by legislative acts, amending their constitutions,⁵⁹ or by popular referendum.⁶⁰

In *Hunter v. Erickson*⁶¹ and *Washington v. Seattle School District*⁶² the Court held that a violation of the Fourteenth Amendment is established when an initiative, although

53. Carcieri, *supra* note 1, at 164.

54. *Id.* at 172.

55. See *Washington v. Seattle Sch. Dist.*, 458 U.S. 457 (1982).

56. U.S. CONST. amend XIV.

57. U.S. CONST. amend XV.

58. See, e.g., *Guinn and Beal v. United States*, 238 U.S. 347 (1915) (Oklahoma Constitutional provision excluding from literacy voting test all persons entitled to vote on or before January 1, 1866, and all persons then living outside the United States, as well as their descendants, violated 15th Amendment rights of black Americans).

59. *Id.*

60. See, e.g., *Reitman v. Mulkey*, 387 U.S. 369 (1967) (initiative by California voters voiding State's housing discrimination law violated Fourteenth Amendment).

61. 393 U.S. 385 (1969).

62. 458 U.S. 457 (1982).

neutral on its face, "mak[es] it more difficult for certain racial . . . minorities to achieve legislation that is in their interest."⁶³ While a state's voters may decide to make it more difficult to enact or amend laws on a certain subject matter, they may not make it selectively more difficult for minorities alone.⁶⁴ Thus, a law that "subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation"⁶⁵ or selectively burdens programs developed "primarily to the benefit of the minority"⁶⁶ violates equal protection.

In *Hunter*, the voters of Akron, Ohio, amended their city charter to repeal a fair housing law passed by the city council and to require approval by the voters before any future housing discrimination ordinance could take effect. Although the referendum did not create an explicit racial classification, the Court held that it discriminated against minorities by making it harder to regulate discrimination in real estate transactions than to regulate other aspects of real estate practice.⁶⁷ In *Seattle*, the voters of Washington passed Initiative 350, a referendum prohibiting local school boards from using busing to remedy de facto segregation, while permitting boards to use busing for other purposes. The Court explained that the practical effect was to reallocate democratic decision-making power on a racial basis.

The initiative removes the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests. Those favoring the elimination of *de facto* school segregation now must seek relief from the state legislature, or from the statewide electorate. Yet authority over all other student assignment decisions, as well as over most other areas of educational policy, remains vested in the local school board. . . . [As] in *Hunter*, then, the community's political mechanisms are modified to place effective decisionmaking authority over a racial issue at a different level of government.⁶⁸

63. *Hunter v. Erickson*, 393 U.S. 385, 395 (1969).

64. *Washington v. Seattle Sch. Dist.*, 458 U.S. 457 (1982).

65. *Id.* at 467.

66. *Id.* at 472.

67. *Hunter*, 393 U.S. at 387-90.

68. *Seattle*, 458 U.S. at 474.

B. *Carcieri Critique of the ACLU Position*

Professor Carcieri asserts that the ACLU's argument, and Judge Henderson's finding, that the *Hunter/Seattle* doctrine was relevant to the Proposition 209 case is "puzzling."⁶⁹ First, he complains, Proposition 209 prohibited affirmative action programs for all racial and gender groups, not just women and minorities; therefore, it had no special impact on minorities or women.⁷⁰ Second, he argues, even if the initiative was directed at minorities and women, it was only directed at denying them preferences, not protecting them from discrimination; because it "functions to place individuals on an equal footing" it cannot violate the right to equal protection.⁷¹ Finally, he concludes, even if the *Hunter/Seattle* doctrine does properly apply to Proposition 209, "it is a sixteen-year-old, five-to-four decision by a much more liberal Court than the Court sitting today," and, as such, should not have been relied upon by the ACLU or Judge Henderson.⁷²

C. *Response to Carcieri's critique*

The ACLU, Judge Henderson, Judge O'Scannlain, Professor Carcieri, and Professors Amar and Caminker, have exhaustively discussed the application of the *Hunter/Seattle* doctrine to the Proposition 209 case; I will not attempt to add anything to that discussion.⁷³ But however this question is ultimately resolved, the reader should not be "puzzled," as Professor Carcieri was, that the ACLU and Judge Henderson found the *Hunter/Seattle* doctrine applicable.

First, despite its neutral language, the initiative had a completely different impact on women and minorities than on white men, because the affirmative action programs banned by Proposition 209 were exclusively programs intended to benefit women and minorities. In this regard, Proposition 209 was just like the Akron amendment struck down in

69. Carcieri, *supra* note 1, at 164.

70. *Id.* at 164-65.

71. *Id.* at 168-69.

72. *Id.* at 172.

73. See Amar and Caminker, *supra* note 52 (arguing that under the *Hunter/Seattle* doctrine, Proposition 209 is unconstitutional). As Professor Carcieri explains, this article was substantially relied upon by the ACLU briefs and by Judge Henderson.

Hunter. As the ACLU explained in its petition for writ of certiorari, the Court in *Hunter*

readily discounted the facial neutrality of the charter amendment, which "dr[ew] no distinctions among racial and religious groups," finding that it would nonetheless uniquely disadvantage those benefiting from race-conscious fair housing laws—i.e., minorities—by forcing them to run a legislative "gauntlet" of popular approval that other laws and thus other groups were spared. As the [*Hunter*] Court concluded, "[t]he reality is that the law's impact falls on the minority."⁷⁴

This is equally true of Proposition 209. The California Ballot Pamphlet prepared by the California Legislative Analyst's Office provided that a "YES" vote on the initiative meant "[t]he elimination of those affirmative action programs for women and minorities"⁷⁵ As Judge Henderson found, and no party disputed, despite its neutral language the only programs affected by the initiative were race-conscious and gender-conscious affirmative action programs for women and minorities.⁷⁶ Professor Carcieri may conclude that there should be an affirmative action exception to the *Hunter/Seattle* doctrine or that the doctrine should be overruled, but to feign "puzzlement" at how Proposition 209 affects women and minorities within the meaning of *Hunter* and *Seattle* is disingenuous at best.

Professor Carcieri's second argument, that the ACLU should not have challenged Proposition 209 because a ban on affirmative action places all people on an "equal footing" and thus cannot violate equal protection, is similarly myopic. The decisions in *Hunter* and *Seattle* speak to this very point. The Akron charter amendment put all people on an "equal footing" by permitting race discrimination against whites and blacks equally. But, as the Court recognized, in a community in which the social problem addressed by the anti-discrimination ordinance was discrimination against blacks, the effect of its repeal was not felt equally—it rested entirely on the black residents of Akron who had lost their legal

74. Coalition for Econ. Equity v. Wilson, No. _____ (1997) Petition for Writ of Certiorari at 17 (citations omitted) (on file with author)

75. See Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1493 (N.D. Cal. 1996).

76. *Id.* at 1489, 1495-97.

protection against discrimination.⁷⁷ The Washington law put all people on an "equal footing" by prohibiting all busing to eliminate segregation, but its impact was felt only by the minority residents of Seattle who had sought a busing remedy to improve their children's education.⁷⁸ In the same way, although Proposition 209 prohibits affirmative action for whites as well as minorities, and men as well as women, it does not put them on a true "equal footing" because such programs have only been needed by women and minorities. The point of the *Seattle* and *Hunter* decisions was to scrutinize laws that, although putting all people on an "equal footing," were discriminatory in their application.

Finally, Professor Carcieri's argument that the ACLU and Judge Henderson should not have relied on the *Hunter/Seattle* doctrine, even if it is applicable, because *Seattle* was decided sixteen years ago on a five-to-four vote by a more liberal Court, is ridiculous. Professor Carcieri cites no authority for the novel proposition that Supreme Court decisions in close cases, or "old" cases (if sixteen years is "old"), should not be treated as *stare decisis*. Such a doctrine would cripple the Court's authority, and reduce all legal questions to political guesswork. As scholarship or advocacy, it deserves to be thoroughly rejected.

V. DESPITE THE CIVIL RIGHTS LAWS AND THE EXISTENCE OF AFFIRMATIVE ACTION, DISCRIMINATION AGAINST WOMEN AND MINORITIES IS FAR MORE PREVALENT THAN DISCRIMINATION AGAINST WHITE MEN

A. Professor Carcieri's Position

Professor Carcieri's purpose in attacking the ACLU's position becomes clear as he moves from law to social science. He argues that because of affirmative action, white men are disfavored in seeking employment in the United States today.⁷⁹ He points in particular to the purported difficulty of finding academic teaching positions in higher education, apparently relying on his own experiences. For example, he

77. See *Hunter v. Erickson*, 393 U.S. 385, 395 (1969).

78. See *Washington v. Seattle Sch. Dist.*, 458 U.S. 457 (1982).

79. Carcieri, *supra* note 1, at 149, 156-57, 177. ("[T]he current trend in the private sector is to disfavor the hiring of white males."). *Id.* at 177 n.151.

asserts that the norm in hiring professors is

the "two pile" method. Under this practice, applications for university teaching positions are sorted at the outset of the selection process into a "favored pile" for women and people of color, and a "disfavored pile" to be denied serious consideration, for white males. It is so widely known to be used among public and private institutions that it is openly discussed in the law journals.⁸⁰

As authority for this very serious accusation, Professor Carcieri's only citations are to a work of fiction. He relies entirely on two related articles appearing in the *Texas Law Review*. The first, Michael Paulson's *Reverse Discrimination and Law School Faculty Hiring: the Undiscovered Opinion*,⁸¹ is an obviously fictional judicial opinion, written by Professor Paulson but described by him, tongue in cheek, as his "discovery" rather than his own work.⁸² Professor Paulson pretends that a law school used the "two pile" hiring method, in order to discuss whether it would be permissible. When asked, Professor Paulson readily admitted that the work was fiction, that he assumed a reader would understand it was fiction, and that he could not document a single case of the "two pile" method being used in faculty hiring.⁸³ Professor Carcieri's second, and final, citation to support his assertions about the two pile method is to an article responding to Professor Paulson's.⁸⁴ This second article assumes the truth of the findings in Paulson's fictional opinion in order to critique its legal analysis.

For a scholar to substitute fiction for fact in this manner is highly disturbing. For such a serious mistake to avoid detection in a highly regarded law journal compounds the problem. If Professor Carcieri's article is widely circulated, it may itself become the "authority" for claims by others that law schools commonly hire by this "two pile" method. To have made this assertion based on such evidence is an egregious and inflammatory error.

Armed with this straw man "evidence" that law schools

80. *Id.* at 149 n.35.

81. 71 TEX. L. REV. 993 (1993).

82. *Id.* at 994.

83. Telephone Interview with Michael Paulson (Mar. 3, 1999).

84. See Richard Delgado, *Five Months Later (The Trial Court Opinion)*, 71 TEX. L. REV. 1011 (1993).

are unfairly disfavoring employment applications by white men, Professor Carcieri argues that the "two pile" method should be abandoned as unnecessary, since white men should not be assumed to disfavor women and minorities.⁸⁵ Earlier in his article, Carcieri complained about the work of another scholar who used personal narrative in an article she wrote on discrimination. Writing about Professor Yxta Maya Murray's use of narrative in her article, *Merit Teaching*,⁸⁶ Professor Carcieri argued "unlike a legal argument in an adversary proceeding, a narrative is not subject to challenge or cross-examination, as is essential when enforceable individual rights are at stake."⁸⁷ But now, he offers his own good deeds, in the form of writing letters of reference for women and minority students applying to law school,⁸⁸ as evidence that white men should not be presumed to discriminate. While making it clear that he personally intends to continue writing reference letters, he concludes that if he were solely concerned with racial and gender self-interest, he should stop helping his female or non-white students.⁸⁹ Finally, he dismisses the possibility of sex discrimination occurring in American life, by pointing out that women "are a majority, not a minority, and 'the majority needs no protection from discrimination.'"⁹⁰ The empirical data discussed in the next section demonstrate that women have a very substantial need for protection, as do minority group members, from race and gender discrimination.

B. Empirical Data Demonstrate that White Men Are Not Disadvantaged in Seeking Academic Positions in Higher Education.

Empirical data abound examining the employment practices of American colleges and universities. Regrettably, Professor Carcieri fails to consider any of these data in

85. He writes, "the idea that white males always stick together, and that the playing field is thus always tilted in their favor, is a sham." Carcieri, *supra* note 1, at 176-77 n.150.

86. 23 HASTINGS CONST. L.Q. 1073 (1996).

87. Carcieri, *supra* note 1, at 160 n.76.

88. *Id.* at 178-79.

89. *Id.* at 180.

90. *Id.* at 170 n.125 (quoting Judge O'Scannlain's opinion for the Ninth Circuit in *Coalition for Econ. Equity v. Wilson*, 119 F.3d 1431, 1441 (9th Cir. 1997).

making his argument that white men are disfavored in academic hiring. Had he done so, he would have been forced to confront the reality that the facts lend no support to his position. Rather, the statistics that follow will demonstrate that white men are not disfavored in seeking academic positions in higher education. These statistics reveal the fact that white men are disproportionately represented among American college, university, and law school faculty, including new faculty; that men in academia are paid substantially more than women; that white men find faculty positions at rates similar to women and minorities; and that at the highest levels of academia—full professors, tenured law professors, and law deans—white men overwhelmingly dominate. They further reveal that in most areas of American life, women and minorities are severely disadvantaged, and that white men enjoy far greater employment opportunities and much higher pay than do comparably qualified women and minority group members.

At last count (Fall 1993) there were 545,706 full-time instructional faculty in American institutions of higher education.⁹¹ Of this total 313,278, or 57.4%, were white men.⁹² An additional 155,492, or 28.5%, were white women.⁹³ Thus 85.9% of the full-time faculty in our colleges and universities in the Fall of 1993 were white; a mere 76,936, or 14.1%, were racial or ethnic minority group members.

By comparison, the 1993 civilian labor force of 128,040,000 employees was 77% white.⁹⁴ African Americans made up 11% of the workforce, Hispanic Americans 8%, and Asian Americans another 4%.⁹⁵ Men composed 54% of the workforce;⁹⁶ white men, 44%.⁹⁷ In other words, our college

91. U.S. DEPARTMENT OF EDUCATION, NATIONAL CENTER FOR EDUCATION STATISTICS DIGEST OF EDUCATION STATISTICS 239, tbl. 226 (1997) ("Full-time instructional faculty in institutions of higher education, by race/ethnicity, academic rank, and sex: Fall 1993").

92. *Id.* I use the term "white" to include only non-Hispanic whites. The census term is "white, non-Hispanic."

93. *Id.*

94. HANDBOOK OF U.S. LABOR STATISTICS tbl. 1 (1997) ("Civilian labor force by sex, age, race, and Hispanic origin, 1982, 1993, and 1994, and moderate growth projection to 2025").

95. *Id.* The data report no American Indian workers, suggesting that the white figure is slightly overstated.

96. *Id.*

97. *Id.* at 11, 16 ("Employment Status of the Civilian Noninstitutional

faculties are significantly more white, and substantially more white and male, than the overall American work force.

Although these data alone are provocative, they still do not tell the full story. In 1993, whites constituted 90.2% of all full professors at American colleges and universities.⁹⁸ Less than 1% of the full professors were African American women, while 15% were white women, and 75.2% were white men.⁹⁹ One might argue that since most of the full professors counted in 1993 had been hired years earlier, the dominance of white men may tell us more about the history of excluding women and minorities than it does the current practice. It is then, particularly revealing that even at the assistant professor level, where most persons counted were in their first few years of college teaching, 81.4% were whites, 57.9% were men, and 46.2% were white men.¹⁰⁰ In other words, the most recent data available concerning employment of newly hired college professors shows that white men are hired at a higher rate than their overall workforce participation. By contrast, African Americans, who made up 11% of the civilian workforce, made up only 6% of the assistant professors in 1993.¹⁰¹ Hispanic Americans, who made up 8% of the civilian workforce, constituted only 2.6% of the assistant professors.¹⁰²

Not only are college professors far more likely to be men than women, the men whom Professor Carcieri describes as disfavored are likely to earn more than their female counterparts. Full-time male faculty in 1995-96 earned an average of 23.2% more than full-time women faculty.¹⁰³ Even among the most recently hired full-time faculty, assistant professors employed in 1995-96, men earned 6.6% more than women.¹⁰⁴ Similar data for minorities is not available.

As of the 1995-96 academic year, 82.1% of the doctoral degrees held by the American civilian population were held

Population, 1947-1995") (white male civilian labor force)).

98. See U.S. DEPARTMENT OF EDUCATION, *supra* note 91, tbl. 226.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 250-51, tbl. 234 ("Average salary of full-time instructional faculty on nine-month contracts in institutions of higher education, by academic rank, sex, and control type of institution: 1970-71 to 1995-96").

104. See U.S. DEPARTMENT OF EDUCATION, *supra* note 91, at 250-51, tbl. 234.

by whites,¹⁰⁵ who held an even greater percentage, 85.9%, of the full-time college and university teaching positions.¹⁰⁶ In 1995, white men, who composed 46.2% of the newly hired full-time faculty, the assistant professors,¹⁰⁷ earned 46.1% of the doctoral degrees awarded by American universities to American citizens and resident aliens.¹⁰⁸ Thus, as of 1995-96, white men were being hired for assistant professor jobs at just slightly above their proportion of newly awarded Ph.D.s. These data are inconsistent with Professor Carcieri's assertion that white men are disfavored in seeking such positions. Rather, the data suggest that in academic hiring, race and sex preferences have been largely eliminated.

Further support for the proposition that white men have similar academic employment opportunities as women and minority group members is found in a 1996 report issued by the Association of American Colleges and Universities.¹⁰⁹ The report describes a study of 393 recipients of Ford, Mellon, and Spencer fellowships who completed their Ph.D.s after 1989. Students receiving such fellowships are the cream of the academic crop; their experiences tell us much about who succeeds in the academic job market of the 1990s. The study sample included significant numbers of whites, blacks, Hispanics, Asian or Pacific Islanders, and American Indians; approximately half were women.¹¹⁰ Participants were asked to rate their post-graduate academic job market experiences. Among those who placed themselves in the top categories of success, in that they reported being sought after, or having a good experience after applying for jobs, were 24% of the white men, 25% of the white women, 26% of the minority women, and 27% of the minority men.¹¹¹ In plain terms, the white men had nearly identical success as the other groups. Among those who reported fewer choices, but who found at least one

105. *Id.* at 18, tbl. 9 ("Highest level of education attained by persons age 18 and over, by age, sex, and race/ethnicity: March 1996").

106. *Id.* at 239, tbl. 226.

107. *See supra* at note 100 and accompanying text.

108. *See* U.S. DEPARTMENT OF EDUCATION, *supra* note 91, 301, tbl. 271 ("Doctor's degrees conferred by institutions of higher education, by racial/ethnic group and sex of student: 1976-77 to 1994-95").

109. *See* DARYL G. SMITH, *ACHIEVING FACULTY DIVERSITY: DEBUNKING THE MYTHS*, ASSOCIATION OF AMERICAN COLLEGES AND UNIVERSITIES (1996).

110. *Id.* at 2.

111. *Id.* at 65, tbl. 14.

faculty position, were 37% of the minority men, 37% of the minority women, 51% of the white women, and 51% of the white men.¹¹² Thus, 76% of the white men received faculty positions, compared with 77% of the white women, 64% of the minority men, and 63% of the minority women.

In 1997-98, 86.8% of American law school faculty members were white, 69.8% were men, and 61.9% were white men.¹¹³ The new faculty first listed in 1997-98 were 83% white, 53.2% men, and 42% white men.¹¹⁴ The candidates known to be actively seeking law school faculty positions in 1997-98 were 21.6% minority, 78.4% white,¹¹⁵ suggesting that white applicants were disproportionately more likely to be hired than minority applicants. The number of new law professors hired each year is quite small. In 1997-98, only 100 new assistant and associate professors were hired, of whom ten were black, one was Hispanic, four were Asian, and 83 were white, including 45 white men.¹¹⁶ These positions are highly competitive; no group has had great success. From 1992-97, fewer than 10% of all known candidates for law faculty positions were successful in joining any faculty.¹¹⁷ In some years, women had greater success than men; in other years, men had greater success than women.¹¹⁸ In each of these years, among the known candidates minority group members had a measurable advantage over white candidates, but it was small enough that in only one of the five years was it statistically significant.¹¹⁹ Among those faculty hired between 1992 and 1997 whose race or ethnicity was reported, the overall success rate for all known candidates was 11%, while the success rate for white candidates was 10%,¹²⁰ and

112. *Id.*

113. Association of American Law Schools Statistical Report on Law School Faculty and Candidates for Law Faculty Positions, 1997-98, tbl. 1A (visited April 9, 1999) <<http://www.aals.org/statistics/rpt9798w.html>>.

114. *Id.* at tbl. 3A.

115. *Id.* at tbl. 5B.

116. *Id.* at tbls. 8D and 8E.

117. *Id.* at tbl. 7A.

118. *Id.* at tbl. 7B (compare 1996-97, when 8.2% of the women and 7.7% of the men were successful, with 1995-96, when 9.4% of the women and 11.2% of the men were successful).

119. Association of American Law Schools Statistical Report on Law School Faculty and Candidates for Law Faculty Positions, 1997-98, 4 (visited April 8, 1999) (commentary on tbl. 7) <<http://www.aals.org/statistics/rpt9798w.html>>.

120. *Id.* at tbl. 7D.

the overall success for white males was 8.8%.¹²¹ In raw numbers, during the years 1992 through 1997, there were 1,803 new law faculty hired at American law schools whose ethnicity was reported.¹²² Despite the system described by Professor Carcieri, in which applications by white men are discarded, 682 of the faculty hired (37.8%) were white men.¹²³ Among law school tenure track hires between 1992 and 1998, 41% were white men, 31% were white women, 14% were minority men, and 13% were minority women.¹²⁴ By comparison, although the precise numbers have not been reported, there are sufficient reported data to discern that fewer than half of all law school graduates in the 1990s have been white men.¹²⁵

Moreover, hiring is no guarantee of tenure. At most American law schools, promotion to tenure is awarded at the time of promotion to full professor. In 1997-98, over thirty years after the passage of the 1964 Civil Rights Act, 72.9% of the full professors at American law schools were white men; only 2.7% were minority women.¹²⁶ And 83.8% of the law school deans were white men; less than 1% were minority women.¹²⁷

These data suggest that white men once had an enormous advantage when applying for college and university teaching positions and may still have such an advantage when considered for tenure. In initial hiring, however, their advantage has shrunk to the point where they are sometimes slightly less likely, and sometimes slightly more likely, to receive such positions when compared with equally credentialed women and minority group members. Rather than telling a story of preferences for women and minority group members, as Professor Carcieri argues, the data suggest that, at best, the playing field has been leveled to the point that women and minority group members have similar

121. *Id.* at tbl. 7E.

122. *Id.* at tbl. 4.

123. *Id.*

124. *Id.* at tbl. 8E.

125. See American Bar Association (visited April 8, 1999) <[http://www.abanet.org/legaled/](http://www.abanet.org/legaled/at_jd.html) at [jd.html](#), [minstats.html](#) and [femstats.html](#)>.

126. Association of American Law Schools Statistical Report on Law School Faculty and Candidates for Law Faculty Positions, 1997-98, at tbl. 1A (visited April 8, 1999) <<http://www.aals.org/statistics/rpt9798w.html>>.

127. *Id.*

opportunities as white men for entry-level academic teaching positions. Of course, to a white man who has become accustomed to enjoying a racial and gender privilege, this may well seem like "reverse discrimination." Hence the importance of relying on empirical data, rather than personal anecdote. In sum, white men are not being excluded from academic teaching positions, but they are being required to compete with women and minorities and are finding that in initial hiring, they no longer have an advantage based on their race and sex. This may be disappointing to some white men, but it is hardly cause to complain.

C. Women and Minorities Continue to Be Substantially Disfavored in Most Areas of Employment in the United States Today

The data described in Part V.B. demonstrates that women and minorities have made substantial progress in achieving equality of employment opportunity in higher education. In most areas of American employment, however, the data suggest far less progress.

As of 1997, a white man whose highest degree was a bachelor's degree earned, on average, \$48,014 per year. A similarly educated black man earned \$35,558, while a Hispanic man earned \$38,130. A similarly educated white woman earned \$28,667, while a black woman earned \$29,311 and a Hispanic woman earned \$27,407.¹²⁸ Thus, women and minorities with bachelor's degrees earned just 57-74% of what similarly educated white men earned. The disparity was even greater for those with master's degrees. While the white man averaged \$63,113, the black man earned just \$40,313 and the Hispanic man just \$36,370. Among women with master's degrees, white women earned an average of \$36,687, compared with \$35,903 for black women and \$37,660 for Hispanic women.¹²⁹ Thus the disparity varied from 57-64%. In 1997, a white man with an associate's (junior college) degree actually earned more, on average, than a black woman with a master's degree.¹³⁰

128. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1998, tbl. 263 (1998) ("Earnings, by Highest Degree Earned: 1997").

129. *Id.*

130. *Id.*

In considering these data, one might wonder what portion represents the continuing effects of past—and once legal—discrimination. It is thus useful to know that by 1995 nearly 70% of the civilian labor force was under the age of 45¹³¹ and had thus entered the labor force after the 1964 Civil Rights Act took effect.

Even among younger workers, those who entered the labor force since the mid-1980s, the disparity is substantial. As of 1998, among year-round full-time workers aged 25-34 holding a bachelor's degree, white men earned an average (median) of \$39,966.¹³² By comparison, similarly well-educated Hispanic men earned just \$32,853, and similarly educated black men earned \$30,415.¹³³ Among similarly educated women, whites earned \$32,095, Hispanics \$30,909, and blacks \$30,628.¹³⁴ In other words, college educated young white men receive an average annual bonus of nearly \$10,000 over similarly educated young black men and women, and of at least \$7,000 over any other group.

As of 1997, African Americans made up 10.8% of the civilian labor force, but constituted 6.9% of all executive, administrative, and managerial employees, 4.8% of all editors and reporters, 4.2% of all physicians, 3.9% of all engineers, 2.7% of all lawyers, and 2.6% of all dentists. They also constituted, however, 15.6% of all cashiers, 17.8% of all cleaners and servants, 21.5% of all telephone operators, 24.2% of all mail clerks, 27.1% of the private household maids and housemen, and 34.5% of all nursing aides, orderlies, and attendants. They were 17% of all typists, but only 8.7% of all secretaries.¹³⁵

Hispanic Americans made up 9.8% of the 1997 civilian labor force, yet constituted 5.4% of all executive, administrative, and managerial employees, 4.8% of the

131. HANDBOOK OF U.S. LABOR STATISTICS 31 ("Civilian Labor Force by Sex, Race, Hispanic Origin, and Age, 1948-1995") (1997).

132. UNITED STATES CENSUS BUREAU, EDUCATIONAL ATTAINMENT, CURRENT POPULATION SURVEY 1998, tbl. 8, (visited April 8, 1999) ("Income by Educational Attainment for Persons 18 Years Old and Over, by Age, Sex, Race, and Hispanic Origin") <<http://www.census.gov/population/www/socdemo/educ-attn.html>>.

133. *Id.*

134. *Id.*

135. U.S. DEPARTMENT OF COMMERCE BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1998, tbl. 672 (Employed Civilians, by Occupation, Sex, Race, and Hispanic Origin: 1983 and 1997).

physicians, 3.8% of the engineers and lawyers, 1.7% of the editors and reporters, and 1.1% of the dentists. By contrast, they also made up 24.8% of the maids and housemen, 31.3% of the private household cleaners and servants, 33.8% of the textile sewing machine operators, 41.3% of the farm workers, and 44.1% of the textile pressing machine operators. They made up 5.4% of the elementary school teachers, but 17.4% of the child care workers.¹³⁶

Women made up 46.2% of the 1997 civilian labor force, but only 30% of the computer programmers, 26.6% of the lawyers, 26.2% of the physicians, 4.7% of the aerospace engineers, 3.1% of the firefighters, 1.6% of the carpenters, 1.5% of the auto mechanics, and 1.2% of the pilots and navigators. By contrast, they made up 93.5% of the registered nurses, 96.5% of the receptionists, and 98.6% of the secretaries. Women were 98.2% of the dental hygienists, but only 17.3% of the dentists. They were 97.8% of the pre-kindergarten and kindergarten teachers, but only 42.7% of the college and university teachers.¹³⁷

Although we have no precise measure of the degree to which sex and race discrimination have caused these disparities, we do have some measures of how common such discrimination is in the 1990s. A series of controlled experiments, in which equally qualified job applicants were paired, and their experiences with specific employers compared, revealed substantial discrimination against well-qualified women and minority job applicants. The Urban Institute conducted several of the experiments.¹³⁸ These studies paired college-age men with identical simulated job qualifications and directed them to seek employment, following a carefully scripted plan, from the same firms. In a study conducted in the summer of 1990, white and black job seekers applied for entry level jobs advertised in newspapers in Washington, D.C. and Chicago. A total of 476 tests, termed "audits," were conducted. In our nation's capitol, when a job was available, the white auditors were more than

136. *Id.*

137. *Id.*

138. See MARGERY AUSTIN TURNER ET AL., OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED: RACIAL DISCRIMINATION IN HIRING (1991); CROSS ET AL., EMPLOYER HIRING PRACTICES: DIFFERENTIAL TREATMENT OF HISPANIC AND ANGLO JOB SEEKERS (1990).

three times as likely to receive job offers as the black auditors.¹³⁹ In Chicago, when a job was available, the white auditors were twice as likely to receive a job offer.¹⁴⁰ In two similar studies, using white and Hispanic auditors in Chicago and San Diego, the white applicants were over 50% more likely to be offered available jobs than were the Hispanic applicants.¹⁴¹ Where both applicants were offered a job, in 16.7% of the cases the white applicant was offered a higher starting salary—a phenomenon never experienced by a black applicant.¹⁴² Where both applicants were offered a job, the average starting salary was \$5.45 per hour. But where only the white applicant was offered the job, the starting pay was \$7.13 per hour.¹⁴³

Another series of audits was conducted between 1990 and 1992 by the Fair Employment Council of Greater Washington, Inc.¹⁴⁴ The tests revealed that “blacks were treated significantly worse than equally qualified whites 24[%] of the time and Latinos were treated worse than whites 22[%] of the time” in employment hiring decisions.¹⁴⁵ A recent study that combined and re-examined the results of the Urban Studies experiments determined that when a white job applicant was interviewed he or she had a 46.9% likelihood of being offered an available job; for a similarly qualified black applicant the likelihood of a job offer was 11.3%.¹⁴⁶ In other words, the white applicant was over four times more likely to get the job than the equally qualified black applicant. In light of these data, it is hard to accept Professor Carcieri’s assertion that white men are “simply asking for what southern blacks during the Civil Rights era sought.”¹⁴⁷

139. *Id.*

140. *Id.*

141. CROSS ET AL., *supra* note 138, at 41, tbl. 5.1.

142. *Id.* at 32.

143. *Id.* at 35.

144. See Christopher Edley, Jr. and George Stephanopoulos, Affirmative Action Review: Report to the President 1995, 21 (visited April 9, 1999) <<http://www.whitehouse.gov/wh/eop/op/html/aa/aa-index.html>>.

145. *Id.*

146. See Marc Bendick, Jr., et al., *Measuring Employment Discrimination Through Controlled Experiments*, REV. OF BLACK POL. ECON. 25, 31 (1994).

147. Carcieri, *supra* note 1, at 146 n.29. Similarly, Professor Carcieri does nothing to bolster his credibility when he complains that the ACLU has the “goal of vindicating the interests only of certain groups.” *Id.* at 148 n.31. Assuming, as one must given the context, that he means the interests of women

Another audit, focusing on discrimination against Hispanics, was conducted by the United States General Accounting Office (GAO). It found that Hispanic job auditors received 25% fewer job interviews and 34% fewer offers than white auditors.¹⁴⁸ In surveying four million employers to determine the effect of the employer sanctions for hiring undocumented workers imposed by the Immigration Reform Control Act (IRCA), the GAO found that 19% of the employers surveyed had decided to entirely stop hiring Hispanics in order to avoid mistakenly hiring illegal aliens.¹⁴⁹

A 1995 audit report focusing on sex discrimination found that in high priced restaurants "men were more than twice as likely to receive an interview and five times as likely to receive a job offer than the women testers."¹⁵⁰ In a 1987 study in which women phoned to inquire about jobs as auto mechanics, electricians, painters, carpenters, and construction laborers, 22% were falsely told the job had been filled when it had not, or falsely told it paid less than it actually did, while another 18% were discouraged from applying.¹⁵¹

VI. THE AFFIRMATIVE ACTION PROGRAMS THAT THE ACLU SOUGHT TO SAVE IN ITS LAWSUIT ARE THE VERY PROGRAMS PROFESSOR CARCIERI SUPPORTS

Although the central point of Professor Carcieri's article was his attack on the ACLU challenge to Proposition 209, in three critical areas he concedes the legitimacy of affirmative action. First, he concedes that in the case of "race-based college admissions, . . . preferences based on immutable traits are relatively defensible."¹⁵² He complains, however, that sex-

and minorities, one can only wonder how some of the ACLU's other clients would react. For example, consider the ACLU's representation of the KKK and the Nazi party in other recent cases.

148. See Edley and Stephanopoulos, *supra* note 144.

149. *Id.*

150. David Neumark et al., *Sex Discrimination in Restaurant Hiring; An Audit Study*, NATIONAL BUREAU OF ECONOMIC RESEARCH, INC. (Feb. 1995).

151. See Norma A. Winston, *Sex-Bias Response to Telephoned Job Inquiries*, *Tampa, 1987*, 72 SOCIOLOGY AND SOCIAL RESEARCH 2, 121-24 (1988).

152. Carcieri, *supra* note 1, at 159 n.74. He makes this concession, he explains, because "[a]n opportunity is a chance. Undergraduate admission to a good public university is thus fairly termed an opportunity and, again, there is some merit to the argument for race based preferences in that context." *Id.* at 171 n.128.

based preferences in public college admission cannot be justified.¹⁵³ Second, he agrees that race-based affirmative action is an appropriate remedy to "identified discrimination."¹⁵⁴ Finally, he expresses his support for affirmative action in the form of "outreach and aggressive recruiting programs [If] they are used only in the pre-selection stages of the public college admissions, employment, and contracting processes" ¹⁵⁵ It is the supreme irony of his article that the forms of affirmative action he in fact supports are the very heart of what the ACLU is attempting to save.

A. College Admission Programs

Much of the public discussion on both sides of the Proposition 209 debate focused on its prohibition of race-based preferences in public education. The news coverage, and the measurable impact in the wake of the initiative's passage, has been largely concentrated on the drop in the number of minority students admitted to the undergraduate programs at UC Berkeley and UCLA, as well as their law schools and medical schools. The admission of non-minority women has not been affected, since there have been no affirmative action admissions based on gender for several years. It is the black, Latino, Filipino, and American Indian students—students Professor Carcieri concedes might be entitled to affirmative action preferences¹⁵⁶—who have suffered dramatically because of Proposition 209. Given Professor Carcieri's concession, he should have applauded the ACLU's position.

B. Remedial Affirmative Action

Remedial affirmative action, which Professor Carcieri also supports,¹⁵⁷ is used in employment and contracting when

153. *Id.* at 159 n.74. He offers no authority for the assertion that public colleges or universities continue to provide gender-based admissions policies. I know of none. It is likely that the only impact of Proposition 209's ban on gender preferences in education will be on math and science programs for middle school and high school girls.

154. *Id.* at 173-75.

155. *Id.* at 181-82.

156. See Carcieri, *supra* note 1, at 159 n.74. "Concededly, preferences based on immutable traits are relatively defensible in this context." *Id.*

157. *Id.* at 173-74.

an employer or business has been identified as having discriminated on the basis of race, sex, or ethnicity. Although at one time governmental entities could also engage in non-remedial set asides,¹⁵⁸ that time is long gone. As Professor Carcieri recognizes, under the Supreme Court decisions beginning with *Wygant v. Jackson Board of Education*¹⁵⁹ and continuing through *City of Richmond v. J.A. Croson Co.*,¹⁶⁰ the Court has prohibited all governmental affirmative action preference programs in government contracting and employment that were not remedial.¹⁶¹ Since 1989, the only preference programs permitted in contracting and employment are remedial programs.

Nonetheless, to say that only remedial affirmative action preferences are available in contracting and employment is not to say that no affirmative action preferences are permitted. Although Justices Scalia and Thomas oppose all affirmative action preferences in these areas,¹⁶² no other member of the Court has joined them in their extreme position. Justice O'Connor, writing for the plurality in *Croson*, reiterated her position in *Wygant* that voluntary affirmative action by state and local government was permissible, and an important anti-discrimination tool, when justified as a remediation of discrimination.¹⁶³ As she explained in *Croson*,

Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. If the city of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such

158. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

159. 476 U.S. 267 (1986).

160. 488 U.S. 469 (1989).

161. The Supreme Court has not addressed the status of outreach programs.

162. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520 (1989) (Scalia, J., concurring); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (Thomas, J., concurring).

163. See *Croson*, 488 U.S. at 509; see also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 290 (1986).

contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise. . . . Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified.¹⁶⁴

Following the *Croson* decision, but prior to the passage of Proposition 209, California's governmental entities could engage in remedial affirmative action preferences in three circumstances. First, a governmental entity could recognize, or discover, that it had been discriminating and could voluntarily establish an affirmative action preference program to remedy its prior conduct. To do so, however, required strong evidence of discrimination and a narrowly tailored affirmative action plan, targeting the victims of the prior discrimination. In governmental contracting, this was the most common form of affirmative action preferences prior to Proposition 209. Although it was only permitted when there was substantial evidence of prior discrimination, several cities had uncovered such evidence, and had thus submitted to affirmative action preference programs.¹⁶⁵ Second, a governmental entity, having been sued for discrimination, could recognize its potential liability and agree to a court-supervised settlement, called a "consent decree," that included a remedial affirmative action preference program. Where the evidence uncovered through civil discovery suggested that the government entity was likely to lose the suit, this was by far the preferable way to settle, since it reduced costs while permitting the government to help shape the remedy. Third, a governmental entity,

164. *Croson*, 488 U.S. at 509.

165. For example, San Francisco, following an extensive investigation designed to meet the *Croson* standards, found that it had long excluded women and minority owned firms from participating in city contracting, and established a remedial affirmative action program. The Associated General Contractors challenged the program in U.S. district court. When Chief Judge Henderson denied the contractors' motion for a preliminary injunction, they appealed to the United States Court of Appeals for the Ninth Circuit, which affirmed the district court decision. See *Associated Gen. Contractors v. San Francisco*, 950 F.2d 1401 (9th Cir. 1991), *cert. denied*, 503 U.S. 985 (1992). The denial of certiorari does not, of course, mean that the Supreme Court approved of San Francisco's affirmative action program; it merely means the Court was not interested in reviewing the program at that time.

having been sued for discrimination, and deciding to fight the case, could lose; the court could then impose a remedial affirmative action preference program.¹⁶⁶

Because of the passage of Proposition 209, the first and second forms of remedial affirmative action are no longer permitted to public entities in California if they include race or gender-based preferences. Only the third remains available and possibly only in cases litigated in federal court. Thus, when it is discovered that a governmental entity has been discriminating against a class of persons based on their race or sex, it cannot voluntarily remedy the problem with constitutionally permitted preferences of the kind Professor Carcieri professes to support,¹⁶⁷ nor can it settle a lawsuit short of judgement. It must wait until it is sued and it has lost and then subject itself to a court ordered remedy. For opponents of remedial affirmative action, this is a good result, since it prevents the adoption of some affirmative action programs and delays others. But the suggestion that a supporter of remedial affirmative action preferences should oppose Proposition 209 is indefensible. Here again, if Professor Carcieri really supports this form of affirmative action, he should have applauded the ACLU's position.

C. Outreach and Aggressive Recruitment Programs

In expressing his support for outreach and aggressive recruiting programs, Professor Carcieri treats them as outside the purview of Proposition 209.¹⁶⁸ But as he recognizes, the initiative's leading proponent, former Governor Pete Wilson, disagrees.¹⁶⁹ Believing that all outreach and recruiting programs that target women and minorities violate Proposition 209, the Governor ordered all such programs de-funded in the wake of its passage. It was, in large part, to save these programs, that the ACLU filed its lawsuit.

166. See, e.g., *United States v. Paradise*, 480 U.S. 149 (1987).

167. Further litigation is likely to occur regarding this question. In *Croson*, Justice Kennedy expressed the view that the state has an "absolute duty" to voluntarily engage in remedial affirmative action when it uncovers its own prior intentional discrimination. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring).

168. Carcieri *supra* note 1, at 182-83.

169. *Id.* at 182-83 n.170 (concerning programs Governor Wilson has asked the legislature to repeal).

A study published in 1998 described all thirty-one state-funded programs that California Governor Wilson had slated for elimination under Proposition 209.¹⁷⁰ Ten of the eleven education programs set for de-funding were outreach, recruitment, or mentoring programs; only one, a student transfer program giving preferences to minority students transferring from community colleges to state universities, was a preference program.¹⁷¹ Two of the three employment programs were outreach and recruiting programs; the third required diversity in the membership of the Youthful Offender Parole Board and the Board of Prison Terms.¹⁷² Most of the remaining programs were contracting programs in which state contractors were required to either reach certain sub-contracting goals or provide evidence that they had invited women and minority-owned businesses to bid on their subcontracts.¹⁷³

One recent decision by the California Superior Court in Sacramento held that outreach programs are unaffected by Proposition 209.¹⁷⁴ But Ward Connerly, the former chair of the campaign in support of the initiative, has announced his intent to appeal.¹⁷⁵ In the absence of clear authority, many governmental entities throughout the state are dismantling their outreach programs.¹⁷⁶

Professor Carcieri points to the City of San Jose's

170. ACLU, REACHING FOR THE DREAM: PROFILES IN AFFIRMATIVE ACTION 1998 (visited April 8, 1999) <<http://www.aclu-sc.org>>. The study was published by a consortium of civil rights organizations, including the ACLU, the Asian Pacific American Legal Center, the California Women's Law Center, Chinese for Affirmative Action, the Employment Law Center, Equal Rights Advocates, the Lawyers' Committee for Civil Rights, the Mexican American Legal Defense and Education Fund, and the NAACP Legal Defense and Education Fund. I wrote the introduction.

171. *Id.* at 7-17.

172. *Id.* at 17-19.

173. *Id.* at 21-27.

174. *Pete Wilson v. State Personnel Bd.*, No. 96CS01082 (Superior Court, Sacramento County), November 30, 1998 available at <<http://www.sna.com/courts/rulings/docs/wilsonr.pdf>> (visited April 16, 1999); see also Henry Weinstein, *Judge Upholds Key Affirmative Action Laws*, L.A. TIMES, Dec. 3, 1998, at A1.

175. Bob Egelko, *Civil Rights Groups Want Action from Davis, Lockyer*, ASSOCIATED PRESS POLITICAL SERVICE, Feb. 5, 1999.

176. See OPPORTUNITIES LOST: THE STATE OF PUBLIC SECTOR AFFIRMATIVE ACTION IN POST PROPOSITION 209 CALIFORNIA <<http://www.equalrights.org>> (1998) (a joint project of Chinese for Affirmative Action and Equal Rights Advocates).

affirmative action program as the kind of program properly eliminated under Proposition 209.¹⁷⁷ But the San Jose program is precisely the kind of aggressive outreach and recruitment program that he claims to support. A description of the history of San Jose's affirmative action efforts illustrates the problems with Professor Carcieri's support of Proposition 209.

Prior to 1989, the City of San Jose had an extensive affirmative action program for the letting of city contracts.¹⁷⁸ In 1989, in the wake of *Croson*, the city voluntarily suspended its program and undertook a "Croson study" to determine whether it was discriminating. The study revealed continuing discrimination in a number of areas, including the use of sub-contractors. Accordingly, in compliance with *Croson*, the city instituted a program in 1991 that established "participation goals" for minority-owned and women-owned subcontractors. In 1996, following the passage of Proposition 209, the city suspended this program and developed a new non-discrimination program designed to comply with Proposition 209. Under the new program, the city requires each bidder on a public works contract to provide evidence that it has not excluded minority-owned and women-owned subcontractors. The contractor can meet the requirement in either of two ways. One, it can demonstrate that it has actually contracted with minority-owned and women-owned subcontractors at a level high enough to dispel any statistical evidence of discrimination. Or two, it can demonstrate that it has made good faith outreach efforts to minority-owned and women-owned subcontractors, by providing them with written notice of an opportunity to bid.

The California Superior Court ruled that by using a numerical reference to measure compliance with non-discrimination policies, and by requiring outreach to minority-owned and women-owned subcontractors, but not white male-owned firms, the city has established a preference, in violation of Proposition 209. The obvious problem with this ruling is that in the absence of these

177. Carcieri, *supra* note 1, at 182 n.168.

178. The facts regarding the City's programs are taken from the briefs in *City of San Jose v. Hi-Voltage Wire Works, Inc.*, CV768694 (California Superior Court, County of Santa Clara), H018407 (Court of Appeal of the State of California, Sixth Appellate District) (on file with author).

efforts, the city can expect to return to its prior practice of favoring, by intent or inadvertence, white male-owned firms over others. If it is not permitted to engage in these kinds of anti-discrimination efforts, it will continue to engage in its well-documented prior discrimination against women and minorities. Yet Professor Carcieri points to the San Jose case as an example of the kind of affirmative action program that should be eliminated.

VII. CONCLUSION

As all civil libertarians must acknowledge, Professor Carcieri certainly has the right to describe his attack on the ACLU as "progressive," or, for that matter, to call it anything he chooses. But liberty demands responsibility, and we must question whether it contributes to an already high-volume debate to treat fiction as fact and anecdote as evidence. Responsible scholarship requires accountability. That, in turn, requires us to support our assertions with citations to authority. I hope the reader agrees I have demonstrated that Professor Carcieri's attack on the ACLU must be rejected as unsound. There were too many analytical errors and too much reliance on anecdote and opinion. I have described this essay as a "conservative" reply because I have tried to limit my assertions to those for which there are confirmable data.